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9 United States of America

10 UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
12

13 DEREK A. CAPOZZI,

14 Plaintiff,

15 v.

16 UNITED STATES OF AMERICA,

17 Defendant.

No. EDCV 10-00239 AHM (DTB)

**ANSWER TO FOURTH
AMENDED COMPLAINT**

18
19 Defendant, United States of America (hereinafter
20 "Defendant"), in response to Plaintiff's Complaint (hereinafter
21 "Complaint"), and without waiving the below-listed affirmative
22 defenses, hereby admits, denies and answers the Complaint as
23 follows:

24 1. Answering the allegations in paragraph one, Defendant
25 states that this paragraph contains Plaintiff's allegations
26 regarding jurisdiction to which no response is required. To the
27 extent that a response is required, Defendant admits these
28 allegations.

2. Answering the allegations in paragraph two, Defendant

1 states that this paragraph contains Plaintiff's allegations set
2 regarding venue to which no response is required. To the extent
3 that a response is required, Defendant admits these allegations.

4 3. Answering the allegations in paragraph three, Defendant
5 admits that Plaintiff was incarcerated at USP Victorville, which
6 is located in Adelanto, California and operated by the Federal
7 Bureau of Prisons, on May 18, 2008. Defendant admits that
8 Plaintiff is currently incarcerated at USP Lewisburg located in
9 Lewisburg, Pennsylvania.

10 4. Answering the allegations in paragraph four, Defendant
11 admits these allegations.

12 5. Answering the allegations in paragraph five, Defendant
13 admits these allegations.

14 6. Answering the allegations in paragraph six, Defendant
15 avers that USP Victorville is a high security facility which
16 houses male inmates.

17 7. Answering the allegations in paragraph seven, Defendant
18 states that this paragraph contains Plaintiff's legal conclusions
19 and characterization of his action to which no response is
20 required. To the extent that a response is required, Defendant
21 denies these allegations.

22 8. Answering the allegations in paragraph eight, Defendant
23 states that this paragraph contains Plaintiff's legal conclusions
24 and characterization of his action to which no response is
25 required. To the extent that a response is required, Defendant
26 denies these allegations.

27 9. Answering the allegations in paragraph nine, Defendant
28 admits these allegations.

1 10. Answering the allegations in paragraph ten, Defendant
2 avers that metal detectors are located at the entrance of each
3 housing unit at USP Victorville with the exception of the Special
4 Housing Unit.

5 11. Answering the allegations in paragraph eleven,
6 Defendant avers that current general post orders for the housing
7 units at the Federal Correctional Complex at Victorville,
8 California indicate that the unit officer should monitor incoming
9 and outgoing traffic of the housing units, randomly conducting
10 pat searches and if a metal detector is present, ensuring each
11 inmate is clearing it. Defendant currently lacks sufficient
12 information to form a belief as to the truth of the allegations
13 regarding May 18, 2008 protocol and therefore denies allegations
14 referring to protocol in place during that time.

15 12. Answering the allegations in paragraph twelve,
16 Defendant avers that current general post orders for housing
17 units at the Federal Correctional Complex at Victorville,
18 California indicate that the unit officer should monitor incoming
19 and outgoing traffic of the housing units, randomly conducting
20 pat searches and if a metal detector is present, ensuring each
21 inmate is clearing it. Defendant currently lacks sufficient
22 information to form a belief as to the truth of the allegations
23 regarding May 18, 2008 protocol and therefore denies allegations
24 referring to protocol in place during that time.

25 13. Answering the allegations in paragraph thirteen,
26 Defendant avers that current general post orders for housing
27 units at the Federal Correctional Complex at Victorville,
28 California indicate that the unit officer should monitor incoming

1 and outgoing traffic of the housing units, randomly conducting
2 pat searches and if a metal detector is present, ensuring each
3 inmate is clearing it. Currently, if a metal detector sounds an
4 alert tone, an officer should request another staff member to
5 assist him/her with a wall search of the inmate in the Unit
6 Officer's Office, but Defendant lacks sufficient information to
7 form a belief as to the truth of the allegations regarding May
8 18, 2008 protocol and therefore denies allegations referring to
9 protocol in place during that time.

10 14. Answering the allegations in paragraph fourteen,
11 Defendant currently lacks sufficient information to form a belief
12 as to the truth of the allegations and therefore denies the
13 allegations.

14 15. Answering the allegations in paragraph fifteen,
15 Defendant currently lacks sufficient information to form a belief
16 as to the truth of the allegations and therefore denies the
17 allegations.

18 16. Answering the allegations in paragraph sixteen,
19 Defendant currently lacks sufficient information to form a belief
20 as to the truth of the allegations and therefore denies the
21 allegations.

22 17. Answering the allegations in paragraph seventeen,
23 Defendant currently lacks sufficient information to form a belief
24 as to the truth of the allegations and therefore denies the
25 allegations.

26 18. Answering the allegations in paragraph eighteen,
27 Defendant currently lacks sufficient information to form a belief
28 as to the truth of the allegations and therefore denies the

1 allegations.

2 19. Answering the allegations in paragraph nineteen,
3 Defendant avers that both Plaintiff and another inmate were armed
4 with weapons on May 18, 2008. These weapons were an 8 inch ice
5 pick type-weapon with a black lanyard and a 6 inch weapon with a
6 serrated blade, a sharpened edge with a point on one end and a
7 black boot string attached as a lanyard.

8 20. Answering the allegations in paragraph twenty,
9 Defendant avers that after the altercation between Plaintiff and
10 the other inmate on May 18, 2008, N. Blier, R.N., conducted
11 medical assessments on both inmates. Defendant avers that
12 Plaintiff sustained several lacerations and puncture wounds on
13 his chest, neck, and right arm on May 18, 2008. Defendant avers
14 that Plaintiff also sustained scratches on his nose on May 18,
15 2008. As to the balance of the allegations stated in paragraph
16 twenty, Defendant currently lacks sufficient information to form
17 a belief as to the truth of the allegations and therefore denies
18 the balance of the allegations.

19 21. Answering the allegations in paragraph twenty-one,
20 Defendant currently lacks sufficient information to form a belief
21 as to the truth of the allegations and therefore denies the
22 allegations.

23 22. Answering the allegations in paragraph twenty-two,
24 Defendant avers that Plaintiff was transported to Loma Linda
25 University Medical Center and Children's Hospital for emergency
26 treatment on May 18, 2008. Defendant avers that documentation
27 from Loma Linda University Medical Center and Children's Hospital
28 indicates that Plaintiff was discharged from the hospital on May

1 27, 2008, following surgery for right ventricular laceration
2 repair.

3 23. Answering the allegations in paragraph twenty-three,
4 Defendant currently lacks sufficient information to form a belief
5 as to the truth of the allegations and therefore denies the
6 allegations.

7 24. Answering the allegations in paragraph twenty-four,
8 Defendant currently lacks sufficient information to form a belief
9 as to the truth of the allegations and therefore denies the
10 allegations.

11 25. Answering the allegations in paragraph twenty-five,
12 Defendant avers that after the altercation between Plaintiff and
13 the other inmate on May 18, 2008, N. Blier, R.N., conducted
14 medical assessments on both inmates. Defendant avers that
15 Plaintiff sustained several lacerations and puncture wounds on
16 his chest, neck, and right arm on May 18, 2008. Defendant avers
17 that Plaintiff also sustained scratches on his nose on May 18,
18 2008. As to the balance of the allegations stated in paragraph
19 twenty-five, Defendant currently lacks sufficient information to
20 form a belief as to the truth of the allegations and therefore
21 denies the balance of the allegations.

22 26. Answering the allegations in paragraph twenty-six,
23 Defendant currently lacks sufficient information to form a belief
24 as to the truth of the allegations and therefore denies the
25 allegations.

26 27. Answering the allegations in paragraph twenty-seven,
27 Defendant currently lacks sufficient information to form a belief
28 as to the truth of the allegations and therefore denies the

1 allegations.

2 28. Answering the allegations in paragraph twenty-eight,
3 Defendant currently lacks sufficient information to form a belief
4 as to the truth of the allegations and therefore denies the
5 allegations.

6 29. Answering the allegations in paragraph twenty-nine,
7 Defendant states that this paragraph contains Plaintiff's legal
8 conclusions and characterization of his action, to which no
9 response is required. To the extent that a response is required,
10 current post orders state that if a metal detector sounds an
11 alert tone, an officer should request another staff member to
12 assist him/her with a wall search of the inmate in the Unit
13 Officer's Office, but Defendant lacks sufficient information to
14 form a belief as to the truth of the allegations regarding May
15 18, 2008 protocol and therefore denies allegations referring to
16 protocol in place during that time.

17 30. Answering the allegations in paragraph thirty,
18 Defendant states that this paragraph contains Plaintiff's legal
19 conclusions and characterization of his action, to which no
20 response is required. To the extent that a response is required,
21 Defendant denies the allegations.

22 31. Answering the allegations in paragraph thirty-one,
23 Defendant states that this paragraph contains Plaintiff's legal
24 conclusions and characterization of his action, to which no
25 response is required. To the extent that a response is required,
26 Defendant avers that Housing Unit Officers assigned to inmate
27 housing units have the responsibility for maintaining good order,
28 security, and high levels of sanitation in the unit at all times.

1 32. Answering the allegations in paragraph thirty-two,
2 Defendant states that this paragraph contains Plaintiff's legal
3 conclusions and characterization of his action, to which no
4 response is required. To the extent that a response is required,
5 Defendant denies the allegations.

6 33. Answering the allegations in paragraph thirty-three,
7 Defendant avers that USP Victorville staff can be comprised of
8 contract employees, typically in the medical profession, as well
9 as staff employed by the Federal Bureau of Prisons. Defendant
10 currently lacks sufficient information to form a belief as to the
11 truth of the allegations that all USP Victorville staff on May
12 18, 2008 were employed by the Federal Bureau of Prisons and
13 therefore denies the allegations.

14 34. Answering the allegations in paragraph thirty-four,
15 Defendant states that this paragraph contains Plaintiff's legal
16 conclusions and characterization of his action, to which no
17 response is required. To the extent that a response is required,
18 Defendant denies the allegations.

19 35. Answering the allegations in paragraph thirty-five,
20 Defendant states that this paragraph contains Plaintiff's legal
21 conclusions and characterization of his action, to which no
22 response is required. To the extent that a response is required,
23 Defendant denies the allegations.

24 36. Answering the allegations in paragraph thirty-six,
25 Defendant states that this paragraph contains Plaintiff's legal
26 conclusions and characterization of his action, to which no
27 response is required. To the extent that a response is required,
28

1 Defendant denies the allegations.

2 37. Answering the allegations in paragraph thirty-seven,
3 Defendant states that this paragraph contains Plaintiff's legal
4 conclusions and characterization of his action, to which no
5 response is required. To the extent that a response is required,
6 Defendant denies the allegations.

7 38. Answering the allegations in paragraph thirty-eight,
8 Defendant admits these allegations.

9 39. Answering the allegations in paragraph thirty-nine
10 which incorporates paragraphs 1-38, Defendant states no response
11 is necessary as Defendant has responded to paragraphs 1-38. To
12 the extent that any response is required Defendant refers to its
13 responses in paragraphs 1-38.

14 40. Answering the allegations in paragraph forty, Defendant
15 states that this paragraph contains Plaintiff's legal conclusions
16 and characterization of his action, to which no response is
17 required. To the extent that a response is required, Defendant
18 denies the allegations.

19 41. Answering the allegations in paragraph forty-one,
20 Defendant states that this paragraph contains Plaintiff's legal
21 conclusions and characterization of his action, to which no
22 response is required. To the extent that a response is required,
23 Defendant denies the allegations.

24 42. Answering the allegations in paragraph forty-two,
25 Defendant states that this paragraph contains Plaintiff's legal
26 conclusions and characterization of his action, to which no
27

1 response is required. To the extent that a response is required,
2 Defendant denies the allegations.

3 The remaining allegations contain a Prayer for Relief, to
4 which no response is required. To the extent that a response is
5 required, Defendant denies the allegations.

6 Defendant alleges the following separate and affirmative
7 defenses as the claims in Plaintiff's Complaint:
8

9 **FIRST AFFIRMATIVE DEFENSE**

10 Plaintiff fails to state a claim upon which relief can
11 be granted.

12 **SECOND AFFIRMATIVE DEFENSE**

13 Defendant and its agents, servants and employees exercised
14 due care and diligence in all matters alleged in the Complaint,
15 and acted within the applicable standard of care. Defendant and
16 its agents, servants and employees deny committing any negligent
17 or wrongful act or omission and deny causing and/or contributing
18 to the damages complained of in the Complaint. No act or failure
19 to act by Defendant, its agents or employees, was the legal cause
20 of any loss or damage to Plaintiff.

21 **THIRD AFFIRMATIVE DEFENSE**

22 In the event Defendant is found to be negligent, which
23 negligence Defendant denies, the negligence of Plaintiff and/or
24 other third party contributed to and/or caused his damages, and
25 any recovery must be proportionately reduced.

26 **FOURTH AFFIRMATIVE DEFENSE**

27 Plaintiff's damages, if any, are limited to the amount
28

1 claimed administratively, under the Federal Tort Claims Act, 28
2 U.S.C § 2675(b) .

3 **FIFTH AFFIRMATIVE DEFENSE**

4 Plaintiff's damages, if any, have been caused at least in
5 part by his failure to mitigate damages.

6 **SIXTH AFFIRMATIVE DEFENSE**

7 Plaintiff's alleged injuries, if any, were proximately
8 caused by his own negligent or otherwise wrongful conduct.

9 **SEVENTH AFFIRMATIVE DEFENSE**

10
11 To the extent that Plaintiff seeks pre-judgment interest or
12 any other monetary amounts not provided for by law, Plaintiff
13 fails to state a claim for which relief can be granted and the
14 Court lacks subject matter jurisdiction over the Complaint
15 pursuant to 28 U.S.C § 2674.

16 **EIGHTH AFFIRMATIVE DEFENSE**

17 Plaintiff is not entitled to a jury trial pursuant to 28
18 U.S.C. § 2402.

19 **NINTH AFFIRMATIVE DEFENSE**

20
21 Defendant asserts the jurisdictional defense of
22 discretionary function which cannot be waived and may be raised
23 at any time.

24 **TENTH AFFIRMATIVE DEFENSE**

25 The United States has not waived sovereign immunity for the
26 payment of attorney's fees in tort cases against it pursuant to
27 28 U.S.C. §2412(d) (1) (A) .
28

ELEVENTH AFFIRMATIVE DEFENSE

Defendant contests the extent of Plaintiff's claimed injuries, whatever they may be, as well as Plaintiff's assertion that said injuries, resulting treatment, alleged requirement for future treatment and/or residual effects were caused by the incident referenced in Plaintiff's Complaint.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff's damages, if any, must be reduced by any collateral source as required by law.

WHEREFORE, Defendant prays for judgment against Plaintiff as follows:

1. That Plaintiff's Complaint and each cause of action contained therein be dismissed with prejudice.
 2. That Plaintiff take nothing by his Complaint;
 3. That Defendant be awarded costs incurred herein;
- and
4. That the Court order such other and further relief for Defendant as the Court may deem just and proper.

Dated: June 11, 2012

ANDRÉ BIROTTE JR.
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Assistant United States Attorney
Chief, Civil Division

/s/ Erika Johnson-Brooks

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